amo REPORT

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# RESPONSE TO BILL 106 AN ACT TO AMEND THE OCCUPATIONAL HEALTH AND SAFETY ACT

THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO
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## ASSOCIATION OF MUNICIPALITIES OF ONTARIO

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**RESPONSE TO**
**BILL 106**
**AN ACT TO AMEND THE OCCUPATIONAL HEALTH AND SAFETY ACT**

## INTRODUCTION:

The rapid change we have witnessed in recent times with respect to the type of work performed, the manner in which it is performed and the technology used have all been contributing factors toward enhancing and enriching the workplace. And yet, the health and safety of those who must perform that work is often one of the last considerations to which careful and thorough thought is given. To this end, municipalities share with the government its commitment to ensure that workers must be able to work without fear that their lives may be in jeopardy.

Many of the amendments being proposed are of a pro-active nature. That is, many of the new health and safety procedures being proposed believe that early detection and preventative maintenance are the routes to follow in order to avert potential long-term tragedy. AMO agrees with this approach but economic realities show that implementing health and safety can be a double-edged sword in two respects.

First, there are the economic realities with which one must contend. On the one hand, while there are costs to be incurred in implementing health and safety procedures, the costs may be greater if not implemented. On the other hand, with health and safety there can be the tendency to be overly cautious and this can easily lead to incurring high long-term expenditures. Thus when deciding on health and safety policy both costs and benefits play major roles.

Second, health and safety is an area that has a natural tendency to encroach upon management's rights to manage since workers play a major role in monitoring the workplace environment and employers are constantly required to defend their practices. While it is difficult to strike an equal balance of rights in this area, any policy should attempt to keep the disruption to management's rights at a minimum and, more appropriately, strive to encourage the employer and its workers to be partners in promoting workplace health and safety.

Prior to the introduction of Bill 106, the government had circulated a draft bill on proposed changes to the Occupational Health and Safety Act. In reviewing the draft bill, AMO had some strong concerns with respect to many of the amendments insofar as not having taken into account the points of consideration noted above. Subsequently, AMO made verbal representations to the government in respect of these concerns and is pleased to see that some of the original amendments that could have posed considerable administrative problems have been eliminated. Others, however, still remain and it is to these that AMO now turns its attention.

**SUMMARY OF RECOMMENDATIONS:**

AMO recommends that:

1) the amendments include a definition for "officer".

2) the amendments to subsections 7(6) and 8(8) permitting inspections at any time and breaking-up inspections over the course of a year not be incorporated into the Act.

3) subsection 18a(1) not come into effect until specific regulations on the procedures and methodology to be followed in order to fully comply with this subsection have been formally established.

4) the subsection 18a(1) be extended to require constructors to provide owners with lists of designated substances to be used, stored, handled or otherwise present at the site.

5) the new subsections 18a(5) and (6) holding owners and constructors liable for not fully disclosing designated substances, not be incorporated into the Act until the practical aspects of complying with the intent of these subsections is more fully explored and resolved.

6) the existing provisions of subsections 23(1)(a) and (b) exempting members of a police force and firefighters from refusing work believed to be unsafe, remain in the Act and that the definition of firefighters be expanded to include crash-fire rescue personnel at airports and volunteer or part-time firefighters.

7) the new subsection 24a(1) be changed to read:
"Notwithstanding subsection 24(2), where a **non-unionized** worker complains that an employer or person acting on behalf of an employer has contravened subsection 24(1), the workers may elect to file a complaint with the Office of Investigations rather than with the Ontario Labour Relations Board.

8) the proposed amendment to subsection 31a(1) compelling an employer to pay at least 75% of the employee's regular wages to an employee who has refused work believed to be unsafe not be incorporated into the Act but that, instead, the employer be compelled to pay 100% of the wages retroactively to the time when that employee first refused to work provided that the work refused has been substantiated by an inspector upon completion of a formal inspection to be unsafe.

9) subsections 24(2), (3), (4) and (5) be amended permitting employers with the right to access arbitration as is now the case with workers.

**RECOMMENDATIONS:**

1) **Definition of "officer":**

**AMO recommends that:**

**the amendments include a definition for "officer".**

**Rationale:**

AMO notes that there are a number of sections of the Act where an inspector is not always called upon to perform "inspection" duties but rather duties more akin to that of an officer. Indeed, the term "officer" would seem to be more appropriate given that these individuals are required to enforce the provisions of the Act. As such the term "officer" should replace "inspector" or should be added.

2) **Intervals for Inspections:**

**AMO recommends that:**

**the amendments to subsections 7(6) and 8(8) permitting inspections at any time and breaking-up inspections over the course of a year not be incorporated into the Act.**

**Rationale:**

Subsection 7(6) presently reads as follows:

> "A health and safety representative may inspect the physical condition of a work place or the part or parts thereof for which he has been selected, as the case may be, **not more often than once a month** or at such other intervals as a Director may direct, and it is the duty of the employer and the workers to afford the health and safety representative such information and assistance as may be required for the purpose of carrying out the inspection."

and subsection 8(8) presently reads:

> "The members of a committee who represent workers shall designate one of the members representing the workers to inspect the physical condition of a work place, **not more often than once a month** or at such other intervals as a Director may direct, and it is the duty of the employer and the workers to afford that member such information and assistance as may be required for the purpose of carrying out the inspection."

The proposed wording replacing subsection 7(6) is as follows:

> "7(6) A health and safety representative may inspect the physical condition of any part of the work place for which the health and safety representative was appointed at any time and shall inspect at least part of the part or parts of the work place for which the health and safety representative was appointed in each month such that in any twelve-month period all of the part or parts for which the health and safety representative was appointed are inspected at least once.
>
> (6a) Notwithstanding subsection (6), the Director may direct that inspections by a health and safety representative be made at such intervals as the Director may direct so long as all of the part of the parts of the work place for which the health and safety representative was appointed are inspected at least once in each twelve month period.
>
> (6b) The employer and the workers shall provide a health and safety representative with such information and assistance as the health and safety representative may require for the purpose of carrying out an inspection at the work place."

The proposed wording replacing subsection 8(8) is as follows:

> "8(8) The members of a committee who represent workers shall designate a member

representing workers to inspect the physical condition of the work place.

(8a) A member designated under subsection (8) may inspect at least part of it at any time and shall inspect at least part of it in each month such that in each twelve-month period all of the work place is inspected.

(8b) Notwithstanding subsection (8a), the Director may direct that inspections by a member designated under subsection (8) be made at such intervals as the Director may direct so long as all of the work place is inspected at least once in each twelve-month period.

(8c) The employer and the workers shall provide a member designated under subsection (8) with such information and assistance as the member may require for the purpose of carrying out an inspection at the work place."

(8d) The members of a committee are not required to designate the same member to perform all of the inspections or to perform all of a particular inspection."

The wording of the proposed amendments is, to say the least, quite confusing. However, the explanatory notes to the bill clarify that the amendment requires an inspection of "part" of the workplace **at least once a month** such that the whole workplace is inspected at least once in each twelve-month period.

The effect of permitting inspections **at any time** means that employee representatives would require more time-off to conduct the same inspections currently being conducted. "Breaking-up" inspections over the course of a year could result in critical problems being missed if the health and safety representative chose at that particular time to defer inspecting that part of work place where the problem existed.

If more inspections are required because either the work place is too large or that inspections are not detailed enough, AMO notes that the existing wording already permits more than one inspection if a Director so orders and does so on

an "as needed" basis. It is logical to assume that, if a Director has been requested to order more frequent inspections and believes such a request to be valid, more than one inspection per month will in fact take place.

Changing the existing wording opens new avenues for potential abuse. That is, the potential would exist for requesting more time-off to conduct inspections but not using all of that time exclusively for its intended purposes.

3) **Inventory of Designated Substances:**

**AMO recommends that:**

**subsection 18a(1) not come into effect until specific regulations on the procedures and methodology to be followed in order to fully comply with this subsection have been formally established.**

**Rationale:**

Subsection 18a(1) is a new subsection that reads:

> "An owner shall determine whether any designated substances are present at the project site and shall prepare a list of all designated substances that are present at the site."

The determination of designated substances is not as easy at it may appear to be. Consider for example waste disposal and landfill sites where the dumping of present-day designated substances may have occurred for decades prior to when these substances were designated. Under these circumstances, to what extent must an owner search for the possibility of designated substances? It is reasonable to require an owner to search through and test decades worth of material for designated substances? And what of substances that may be designated after a project has commenced? Indeed, such situations call for flexibility and guidelines for determination. These will, hopefully, be addressed by the Minister of

Labour's right-to-know legislation and the federal government's Workplace Hazardous Materials Information System.

4) **Informing Constructor of Designated Substances:**

**AMO recommends that:**

**the subsection 18a(1) be extended to require constructors to provide owners with lists of designated substances to be used, stored, handled or otherwise present at the site.**

**Rationale:**

This subsection precludes situations where the constructor brings designated substances to the site. A logical extension of the new subsection is to place the same onus for information on the prospective constructor.

5) **Liability of Owner for NOT Informing About Designated Substances:**

**AMO recommends that:**

**the new subsections 18a(5) and (6) holding owners and constructors liable for not fully disclosing designated substances, not be incorporated into the Act until the practical aspects of complying with the intent of these subsections is more fully explored and resolved.**

**Rationale:**

The new subsection 18a(5) reads as follows:

> "An owner who fails to comply with this section is liable to the constructor and every contractor and subcontractor who suffers any loss or damages as the result of the subsequent discovery on the project of a designated substance that the owner ought reasonably to have known of but was not on the list prepared under subsection (1)."

And the new subsection 18a(6) reads as follows:

> "A constructor who fails to comply with this section is liable to every contractor and subcontractor who suffers any loss or damages as the result of the subsequent discovery on the project of a designated substance that was on the list prepared under subsection (1)."

The same line of reasoning presented in recommendation #6 is applicable here. These subsections would place a tremendous burden on owners and constructors. In the absence of concrete guidelines specifying the extent to which designated substances must be sought, the owner or constructor is almost always likely to incur a liability.

Until the practical aspects of complying with the intent of these subsections is more fully explored and resolved, these subsections should not be placed into the legislation.

6) **Exemption of Police and Fire from Refusal Section:**

**AMO strongly recommends that:**

**the existing provisions of subsections 23(1)(a) and (b) exempting members of a police force and firefighters from refusing work believed to be unsafe, remain in the Act and that the definition of firefighters be expanded to include crash-fire rescue personnel at airports and volunteer or part-time firefighters.**

**Rationale:**

Subsections 23(1)(a) and (b) currently exempt members of a police force and firefighters from being able to refuse work believed to be unsafe.

Although no amendments have been introduced as yet to permit these groups with some form of refusal, it has been brought to AMO's attention by the

Ministry of Labour that such amendments may be introduced as this bill proceeds through the legislative process.

AMO has and will continue to oppose any move that proports to change this exemption. In brief, the main reasons for this opposition are as follows:

(i) police officers and firefighters knowingly accept the hazards associated with their jobs as a term and condition of employment and are compensated as such,

(ii) through the tax base, the public pays for the protection of property,

(iii) there would be tremendous administrative problems that would hinder a municipality's ability to adequately provide police and fire services to the public, and,

(iv) the public, with its dependency upon the prompt and proper delivery of police and fire services, is not likely to tolerate such a move.

Aside from these, however, also lie certain fundamental and practical questions. For example, how is a police officer or firefighter to know which work can be refused and when it can or cannot be refused? Who should be held responsible when work **believed** to be unsafe and **believed** not to endanger the life of another individual does actually injure someone?

Indeed, while the refusal section of the Act is founded upon mere **beliefs** that work may be unsafe, such a section has been permitted for certain groups whose work can be demonstrated not to endanger public safety. However, this claim cannot be held in the case of police officers and firefighters even where, superficially, it may appear that the public is in no immediate danger.

Additionally, AMO feels that the definition of firefighter, for purposes of occupational health and safety, should be expanded to include crash-fire rescue

personnel at airports to ensure that their health and safety needs are covered by the provincial jurisdiction in which their duties are performed.

Volunteer or part-time firefighters should be included in the definition as well since these individuals, similar to their full-time counterparts, perform many of the same duties and responsibilities, are compensated for their work and are covered by workers' compensation provisions. As a result, they should be treated the same as full-time firefighters where occupational health and safety is concerned.

7) **Complaints of Non-Unionized Workers:**

**AMO recommends that:**

**the new subsection 24a(1) be changed to read:**

**"Notwithstanding subsection 24(2), where a <u>non-unionized</u> worker complains that an employer or person acting on behalf of an employer has contravened subsection 24(1), the workers may elect to file a complaint with the Office of Investigations rather than with the Ontario Labour Relations Board.**

**Rationale:**

There is some confusion with respect to this subsection. The explanatory note in the margin of the bill states "Complaint of **non-unionized worker**" and yet nowhere in the text of that subsection is the word **non-unionized** used. This oversight should be rectified.

8) **Worker's Right To Be Paid After Refusal:**

**AMO recommends that:**

**the proposed amendment to subsection 31a(1) compelling an employer to pay at least 75% of the employee's regular wages to an employee who has refused work believed to be unsafe not be incorporated into the Act but that, instead, the employer be compelled to pay 100% of the wages retroactively to the time when that employee first refused to work provided that the work refused has been substantiated by an inspector upon completion of a formal inspection to be unsafe.**

**Rationale:**

The effect of compelling an employer to pay a worker 75% of his/her wages during the period of refusal would only serve to encourage frivolous complaints. If the complaint is not substantiated, the employer would still be penalized. However, by the same token, AMO does not believe that a worker should be penalized by not being paid his/her wages where the complaint is founded.

As a consequence, the above recommendation would serve to balance the rights of the employer and worker.

9) **Arbitration:**

**AMO recommends that:**

**subsections 24(2), (3), (4) and (5) be amended permitting employers with the right to access arbitration as is now the case with workers.**

**Rationale:**

The current provisions only permit a worker or his/her bargaining agent from accessing an arbitration process. Although there are no amendments to these sections, the right to arbitration should be made equally available to the employer on the same basis and with the necessary modifications. This would be in keeping with generally accepted principles of labour relation that both parties should have equal access to a process of resolution where a difference cannot be resolved.

## Appendix A

### Minority Position of the Large Urban Section of AMO

The Large Urban Section of AMO as an alternative to recommendation #6 suggests that police officers and firefighters be placed under the current provisions of subsection 23(2) of the Act.

Subsection 23(2) of the Act presently reads:

> "Where circumstances are such that life, health or safety of another person or the public may be in imminent jeopardy, this section does not apply to a person employed in the operation of any of the following institutions, facilities or services whether granted aid out of monies appropriated by the Legislature or not and whether operated for private gain or not ..."

The Large Urban Section feels that, in non-emergency situations, police officers and firefighters should have the same right as any other employee to refuse hazardous work especially where such hazard is caused as a result of faulty or defective equipment.

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